IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5307 of 2001

with

SPECIAL CIVIL APPLICATION No 5274 of 2001, 5275 of 2001 and 5276 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GANPATBHAI N RATHOD

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 5307 of 2001

MR. MUKESH D RAVAL for petitioner No. 1

MRS. (DR.) SONIA HURA WITH MR. MR RE VARIAVA for Respondent No. 1

MS. KATHA GAJJAR, AGP, for Respondent No. 1,2-6

2. Spl. C.A. No. 5274/2001

MR. Y.S. LAKHANI WITH MS. YAMINI J. DESAI for petitioner

MS. KATHA GAJJAR, AGP, for the respondents.

3. Spl. C.A. No. 5275/2001

MR. Y.S. LAKHANI WITH MR. AMAR D. MITHANI for petitioner.

MS. KATHA GAJJAR, AGP, for the respondents.

4. Spl. C.A. No. 5276/ 2001

MR. Y.S. LAKHANI WITH MR. ASHISH M. DAGLI for petitioner.

MS. KATHA GAJJAR, AGP, for the respondents.

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 14 /8/2001

C.A.V. JUDGEMENT

1. Ganpatbhai N. Rathod-petitioner has filed this petition praying for a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction quashing and setting aside the order dated 27th June, 2001. The petitioner had challenged the said order passed by the Additional District Magistrate, Bharuch which has been passed under Section 144 of the Criminal Procedure Code (hereinafter referred to as `the Code'). The District Magistrate has imposed certain conditions for carrying out fishing activity by putting up of wooden pole with nets on the bank of the Narmada River for two months, in certain circumstances on the ground of public safety. This petition has been filed by the petitioner along with other Tribals (hereinafter referred to as the petitioners). Along with this petition, there are other Special Civil Applications namely, Spl. C.A.. No. 5274/2001 filed by Ashapuri Fishing Udyog Seva Sahkari Mandali, 5275/2001 filed by the Reva Fishermen Co-op. Society and , 5276/2001 filed by Ganpatbhai Raisangbhai Gohel before this court. All these petitions raise identical question of law and facts and therefore, I have heard all these matters together.

2. However, some of the fishermen filed caveat and affidavit in Special Civil Application No. 5307 of 2001. The learned advocate for the petitioner as well as learned A.G.P. along with other learned counsel for the respondents had requested me to take up the said matter. Therefore, I have taken up facts of the said matter.

3. It may also be stated earlier for the interim order I had heard Special Civil Application No. 5275 of 2001 and by the order dated 30.7.2001, this court admitted the matters and also granted interim relief staying the effect of the Notification.

4. Being aggrieved and dissatisfied with the said order Bhadbhut Matsya Udyog Co-op. Society and Anr. filed Letters Patent Appeal being L.P.A. No. 730 of 2001 which was heard by a Division Bench (Coram: Hon'ble Mr. D.M. Dharmadhikari, C.J. and K.R. Vyas, J) and the Division Bench by its order dated 1.8.2001 did not interfere with the said order but directed to take up the petition for final hearing at the earliest possible date. Therefore, I have heard the matter for final disposal.

5. The facts giving rise to this petition are as under:

5.1 It has been stated in the petition that the petitioner is Ex-Sarpanch of Jolva Village, Taluka Vagra, District Bharuch. The petitioners are staying in the villages which are situated on the bank of the Narmada River. In other petitions there are some Co-operative Societies which are carrying on fishing activities (hereinafter referred to as `the petitioners'). They are mainly engaged in the fishing activities in the Narmada River.

5.2 It is stated in the petition that the petitioners are carrying on fishing activities by setting up wooden poles on the bank of the Narmada River and in the small islands created due to flow of the Narmada River. It has been stated that one net is attached and at the time of high-tide, in the Narmada River whatever fish is trapped in the nets, the petitioners carry on the activity of fishing from the morning till evening and earning their livelihood by selling them. This technique of fishing is an economic way and it does not require advance device i.e. mechanical boats and other big devices.

5.3 It has been stated in the petition that the Addl. District Magistrate, Bharuch, has issued a Notification dated 28.6.2001 under Section 144 of the Code. By the said Notification the Additional District Magistrate directed that right from Jolva along with other talukas nobody should carry on activity of fishing by putting up wooden poles with nets for two months. While issuing the said Notification the District Collector has considered the representation dated 31.5.2001 submitted by certain fishermen pointing out the difficulties of fishing

activity by putting up wooden poles. He has also considered the report of the Director of Fisheries who has also given report dated 12.6.2001 and also recommended that the persons who are carrying on fishing activities by putting up of wooden poles, there is a danger of public safety and also for human-being if their boats are going in the Narmada River which may involve in the nets which are fixed with wooden poles.

6. Before I examine the contentions of petitioners in the present petition, I have been informed that similar Notifications were issued in the year 1999 as well as in the year 2000 during monsoon season. In the year 1999 as well as in the year 2000 similar writ petitions were filed before this court and originally this court issued rule and granted interim relief but when ultimately on the ground of alternative remedy the same were disposed of as withdrawn. So there is no final adjudication about the legality and validity of the Notification in this behalf. It has been submitted that this problem occurs only during monsoon season when there is more water in the river of Narmada river and also more water flow due to tide. There are lot of fishes coming in the river of Narmada and therefore this problem is peculiar to only monsoon season.

7. It has been stated in the petition that in the current season particular fish (Hilsa) arrived in the season and on account of putting wooden poles, it will affect the fishing activity to catch Hilsa fish and accordingly, the Notification came to be issued.

8.1 The petitioner has challenged this Notification on the ground that the same is being illegal, in violation of the fundamental rights enshrined under the Constitution of India and also in gross violation of Article 19(1)(g) of the Constitution whereby the right of the petitioner to carry on business without any obstacle is affected.

8.2 It has been stated in the petition that the petitioners along with other fishermen (i.e. society of fishermen) of Bharuch District are carrying on fishing activity. It has been stated in the petition that this Notification appears to have been issued with a purpose to help big fishermen and because of some political reason. It is stated that the effect of this Notification is stated to be only for a period of two months from the date of its publication. It has also

been stated that this Notification has been issued with a view to see that the members of the petitioner society could not carry on their business particularly in these two months of monsoon season with the help of wooden poles and nets. It is also mentioned that the members of the petitioner society being small fishermen have to earn their livelihood by carrying on fishing activity in these two months only.

8.3 It has also been further stated that if the members of petitioner society are not permitted to insert wooden poles, the big fishermen carry on fishing activity with the help of mechanical boats can go even in the middle of the river and catch fish whereas the members of the petitioner society being small fishermen, they do not have mechanical boat and they cannot go in the middle of the river and catch fish. The said action of the respondent authority is in clear violation of Article 19(1)(g) of the Constitution of India.

8.4 It has also been stated in the petition that number of people had made grievance against the said Notification and they have given their representation to the Collector, Bharuch on 31.5.2001. The said representation is given with the signatures of so many persons. However, the authority has not even taken care to reply to the representation made by the members of the petitioner society before issuing the said Notification.

8.5 The learned counsel for the petitioner, has also referred to the provisions of Section 144 of the Cr.P.C. which read as follows:-

"Sec. 144(1) In cases where, in the opinion of a District Magistrate, a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this Section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety or a disturbance of the public tranquility, or a riot, or an affray.

(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed ex parte.

(3) An order under this section may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area.

(4) No order under this section shall remain in force for more than two months from the making thereof.

Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any affray, it may, by notification, direct that an order made by a Magistrate under this Section shall remain in force for such further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired, as it may specify in the said Notification.

(5) Any Magistrate may, either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this section, by himself or any Magistrate subordinate to him or by his predecessor in office.

(6) The State Government may, either on its own motion or on the application of any person aggrieved, rescind or alter any order made by it under the proviso to sub-section (4).

(7) Where an application under sub-section (5) or sub-section (6) is received, the Magistrate, or the State Government, as the case may be, shall afford to the applicant an early opportunity of appearing before him or it, either in person or by pleader and showing cause against the order; and if the Magistrate or the State Government, as the case may be, rejects the application wholly or in part, he or it shall record in writing the reasons for so doing."

8.6 He has also relied on the decision of the Hon'ble Supreme Court in the case of GULAM ABBAS VS. STATE OF U.P. reported in AIR 1981 SC 2198 in which on page 2225 at para 26, it is inter alia observed as under:-

"The entire basis of action under Section 144 is provided by the urgency of the situation and the power thereunder is intended to be availed of for preventing disorders, obstructions and annoyances with a view to secure the public weal by maintaining public peace and tranquility. Preservation of the public peace and tranquility is the primary function of the Government and the aforesaid power is conferred on the executive magistracy enabling it to perform that function effectively during emergent situations and as such it may become necessary for the Executive Magistrate to override temporarily private rights and in a given situation the power must extend to restraining individuals from doing acts perfectly lawful in themselves, for, it is obvious that when there is a conflict between the public interest and private rights the former must prevail. It is further well settled that the section does not confer any power on the Executive Magistrate to adjudicate or decide disputes of civil nature or questions of title to properties or entitlements to rights but at the same time in cases where such disputes or titles or entitlements to rights have already been adjudicated and have become the subject matter of judicial pronouncements and decrees of Civil Courts of competent jurisdiction then in the exercise of his power under Section 144 he must have due regard to such established rights and subject of course to the paramount consideration of maintenance of public peace and tranquility the exercise of power must be in aid of those rights and against those who interfere with the lawful exercise thereof and even in cases where there are no declared or established rights the power should not be exercised in a manner that would give material advantage to one party to the dispute over the other but in a fair manner ordinarily in defence of legal rights, if there be such and lawful exercise thereof rather than in suppressing them. In other words, the Magistrate's action should be directed against the wrong doer rather than the wronged. Furthermore, it would not be a proper exercise of discretion on the part of the Executive

Magistrate to interfere with the lawful exercise of the right by a party on a consideration that those who threaten to interfere constitute a large majority and it would be more convenient for the administration to impose restrictions which would affect only a minor section of the community rather than prevent a large section more vociferous and militant."

8.7 The learned counsel for the petitioner has relied on the decision of the Hon'ble Apex Court in the case of ACHARYA JAGDISHWARANAND AVADHUTA VS. COMMISSIONER OF POLICE, CALCUTTA reported in 1983 CRI. L.J. 1872. In that case A.J. Avadhuta etc.-petitioners were carrying on some religious activity and carrying out procession in public street and meeting to be held in public places by Anand Margis. In that context the State of West Bengal had repeatedly issued Notification under Section 144 of the Code from time to time. This action of the Government was challenged before the court and in this case the Apex Court in para 14 on page 1879 after examining certain decisions of several courts, has observed as under:-

"The proviso to sub-section (4) of Section 144 which gives the State Government jurisdiction to extend the prohibitory order for a maximum period of six months beyond the life of the order made by the Magistrate is clearly indicative of the position that Parliament never intended the life of an order under Section 144 of the Code to remain in force beyond two months when made by a Magistrate. The scheme of that section does not contemplate repetitive orders and in case the situation so warrants, steps have to be taken under other provisions of the law such as Section 107 or Section 145 of the Code when individual disputes are raised and to meet a situation such as here, there are provisions to be found in the Police Act. If repetitive orders are made it would clearly amount to abuse of the power conferred by Section 144 of the Code."

8.8 He has also relied on judgement of the Calcutta High Court in the case of PORT COMMRS., CALCUTTA VS. JOGENDRA reported in AIR 1933 CALCUTTA 348 in which on page 350 the court has observed as under:

"Now there can be no doubt or dispute that the legislature by S. 144 of the Code has conferred very large powers upon Magistrates who have to

deal with urgent cases of nuisance or apprehended danger. That section enables a Magistrate to make temporary orders, irrespective of the rights of the parties concerned."

Again on page 351 the court has further observed as follows:

"Courts, civil as well as criminal, exist for the protection of rights and therefore the authority of a Magistrate should ordinarily be exercised in defence of rights rather than in their suppression; when an order in suppression of lawful rights have to be made it ought not to be made unless the Magistrate considers that other action that he is competent to take is not likely to be effective; and the order, if made, should never be disproportionate to but should always be, as far as possible, commensurate with the exigencies of any particular situation."

8.9 The learned counsel for the petitioner has further relief on the judgement of the Punjab and Haryana High Court in the case of MUNICIPAL COMMITTEE, DHANAULA VS. DISTRICT MAGISTRATE, SANGRUR reported in AIR 1968 PUNJAB AND HARYANA 303 and also another judgement of the Madras High Court in the case of M. KOKKARAJ AND ORS. VS. THE EXECUTIVE MAGISTRATE AND ANR. reported in 1991(1) Crimes 143. He has also relief on the judgement of the Andhra Pradesh High Court in the case of BIJINIBEMULA LINGA MURTHY REDDY AND ORS. VS. BINJI HUSSAIN SAHEB AND ANR. reported in 1979 Cri. L.J. 1147 and also the decision in the case of PARBHAS KUMAR ROY VS. THE OFFICER-IN-CHARGE OF RANINAGAR POLICE STATION AND OTHERS reported in 1985 Cr.L.J. 957. The court in that case was concerned regarding the dispute with regard to fishing in public tanks. There was a dispute between two groups of people for carrying on business. In that context, the District Magistrate has issued a Notification under Section 144 of the Code prohibiting the fishing operation in Meenakshipuram, Kanmoi and also all processions, meetings etc. within the limits of the village for a period of 30 days. In that context the said Notification was challenged and after relying on the said decision of Andhra Pradesh High Court in the case of BIJINIBEMULA LINGA MURTHY REDDY AND ORS. (supra) the court held that the order under Section 144 of the Code prohibiting fishing operation and all operations were not properly exercised. The court relied on those decisions and ultimately allowed the petition and stayed the said Notification. The Court also relied on the decision in

the case of PARBHAS KUMAR ROY VS. THE OFFICER IN CHARGE OF RANINAGAR POLICE STATION AND OTHERS (supra).

8.10 He has submitted that the aforesaid Notification has been issued contrary to and inconsistent with the said principle and therefore the same is liable to be set aside.

8.11 He submitted that as the petitioners who are carrying of the activity of fishing are deprived of carrying on their activity of fishing, their rights under Article 21 of the Constitution are violated and their rights to livelihood contained under Article 21 of the Constitution are also violated.

8.12. The learned counsel for the petitioner has submitted that the Notification has been issued for collateral purpose or improper object. He submitted that this Notification has been issued at the instigation of other group of fishermen who have made submissions that fishing activity with wooden poles with net should not be carried.

9. Mr. Y.S. Lakhani, learned counsel for the petitioner has also filed additional affidavit dated 8.8.2001. He has stated that small fishermen are carrying fishing activity since last number of years by inserting pole during the rainy reason. The approximate distance between Kaladra to Luwara is 7 kms. from one bank to other bank and small fishermen are carrying on fishing activity only in one kilometer area since the remaining 5 kilometers area is covered by deep water from the said area fishermen who are having boats are doing fishing activity. He has also filed along with this affidavit, affidavits of various fishermen in which it has been stated that small fishermen are carrying on fishing with wooden poles in area of 1 km.

10. He has also relied on Commentary of Criminal Procedure Code particularly the author N. Iyer, para 1000 wherein the learned author has analysed Section 144 of the Cr.P.C. The learned author has stated the principle as to when the State Government can interfere with the order which is held proper. He submitted that order under Section 144 of the Code is made only in urgent cases of nuisance or apprehended danger. He submitted that the order should mention the material facts. He has also relied on the commentary on duty of the Magistrate. He has further submitted that the order has been proceeded by enquiry and the Magistrate must check the evidence on record.

SUBMISSIONS ON BEHALF OF THE RESPONDENT:

11. On behalf of the respondent Ms. Katha Gajjar, learned A.G.P. appeared. She has stated that in the Notification there is a reference of representation (on page 48) dated 31.5.2001 by certain people which representation is also annexed with the affidavit in which they have pointed out their difficulties to the Collector that if the persons are allowed to carry on the activity of fishing by putting up wooden poles along with nets, the same will endanger to the human-life of other fishermen and there is a question of public safety. They have requested to issue necessary Notification prohibiting this type of activity. She has further invited my attention to the report of the Director of Fisheries who has visited the place on 12.2.2001. The Director of Fisheries has also stated that there are about 500 wooden poles. If the persons are allowed to carry on fishing activity with the help of wooden poles along with nets particularly at the time of high tide and if these wooden poles are not easily visible particularly at night time then they may hurdle the life of human being particularly other small fishermen who are carrying of activity of fishing with small boat. She has stated that if fishing activity with traditional way i.e. with small nets and boats is carried on, it will help all fishermen and it will not endanger to the life of people. She also stated that this activity is also contrary to the breeding of Hilsa fish. A copy of the said report is placed on page 33 of the petition. She submitted that the District Magistrate, therefore, considered the representation as well as the report of the Director, Fisheries. He has also considered the report of police, Sub-Divisional Magistrate which has been produced here. Learned A.G.P. has also stated that there are some complaints filed in this behalf for violation of Section 431 of the I.P.C. which provides mischief to public road, bridge, river or channel.

12.1 She has further relied on the affidavit of Shri A.U. Buch, Dy. Director on behalf of Commissioner of Fisheries. It was further stated that the petitioner erect poles across the river and by tying the nets they create a barrier in the course of upward migration of Hilsa fish. This anadromous and ascending migration is a phenomenon only occurring during monsoon season. Hence

erecting poles and creating barriers by the petitioner is to be checked by way of notification to preserve and onserve this economically important species of fish. The Notification issued by the Additional District Magistrate, Bharuch, is proper and justifiable.

12.2 It has been further stated that these poles erected when go under submergence due to inundation may cause accident to many people who are carrying on fishing activity with their small boats. The persons along with small boats may drown due to their boats collided with the nets which are fitted with nets and that will endanger the public life and public safety in this behalf. She therefore submitted that there is sufficient ground prevailing for immediate prohibition of such mishap which may occur in the river of Narmada. She further submitted that in view of the same, the Notification has been issued restraining certain people from carrying on the activity of business of fishing with wooden poles and nets affixed therein. She submitted that the activity of such persons may create injury to other persons and danger to the life of human being. She submitted that the condition precedent for exercising power under Section 144 of the Code are satisfied and therefore, the authority is perfectly justified in issuing the Notification.

12.3 In support of the aforesaid contention she has also relied on the affidavit of Shri R.G. Gohil, Addl. District Magistrate, Bharuch in which it has been stated that the authority has considered all facts and aspects put forth by other concerns or care taker institution such as Department of Police, Commissioner of Fisheries and other fisheries mandali who have represented that issuance of such Notification is large interest of public. She further submitted that looking to the situation of the law and order as well as larger interest of public, the Addl. district Magistrate before issuing the order has carefully examined the representation made before him and the reports put forth before him for doing needful in the subject matter. He has considered the representation of other people, report of the Director of Fisheries which I have already considered. Learned A.G.P. further submitted that the authority found that looking to the records on the subject matter it was necessary in the interest of justice to keep such place open for each and every other fishermen instead of keeping some reservation by few of the fishermen putting their poles into the river for reservation limited to their own. It has been further stated that this Notification has been issued only in the interest of

public and public maintenance in favour of large number of people and their safety.

13. On behalf of other group of Mandalis namely, one Bhadbhut Matsya Udyog Co-op. Society and other Machhi Samaj, Bharuch have appeared on a caveat and they have also filed necessary reply opposing admission the petition. On behalf of them Dr. Sonia Hura with Mr. Variava appeared and they have also tried to support the contention of the Government in this behalf.

13.1. She has also relied on List I of SEVENTH SCHEDULE of the Constitution - Entry 57. Entry 57 reads as under:

"Fishing and fisheries beyond territorial waters"

List II (State List) Entry 21 provides `Fisheries' -

13.2 On a conjoint reading of both the Entries, she submitted that the State legislature has exclusive competence over fisheries situated within the territory of its State including those within its adjoining territorial waters. This power includes not only to regulate fishing but also to prohibit fishing altogether in particular times. (See: United Provinces Vs. Atiqa Begum, AIR 1941 FC 16 (25)).

13.3 Learned counsel for the respondent has submitted that Article 46 provides for promotion of educational and economic interests of Scheduled Castes/Scheduled tribes and other weaker sections of the society. She submitted that under the said Article the State shall promote with special care the educational and economic interests of the weaker sections of the people and shall protect them from social injustice and all forms of exploitation.

13.4 In the affidavit in reply the learned counsel pointed out that thought it has been contended in the petition that the petitioner belonging to poor strata but on the contrary the petitioner and others who are financially absolutely well off and who are agriculturists and not fishermen had adopted nefarious tactics of fishing in the river by inserting the poles in the bed of the river and thereafter connecting one pole with the other pole with a nylon net. It has been submitted that essentially this amounts to erecting a wall of net right across the river horizontally thereby

blocking the entire passage. It has been submitted that on account of this there was lot of uproar and opposition in the entire area of Bharuch District and the same was brought to the notice of different authorities. It was submitted that by inserting wooden poles and tying nets from one bank to other bank horizontally thereby blocking the entire passage right across the river, they are committing offence punishable under Section 431 of the I.P.C. It is submitted that there is not only one horizontal row of poles and net from one bank to the other bank but there are about 40 to 50 such rows covering a distance of about 10 kms. in a stretch. It has been stated that the distance between one bank to the other is two kms. and from this it was submitted that the distance was such we get an idea of total area covered by such poles and nets. It was submitted that the main purpose of the petitioner fishermen is that no sooner the water recedes during the low tide the fishes get trapped in the net and thereby these people indulging in this activity can easily walk off with a substantial amount of catch. It has been further submitted that on account of activity of the petitioners, life of the small fishermen remains in constant danger and further on account of this obstruction they have to confine their fishing activities within a particular spot in the river. The learned counsel submitted that high tide and low tide is dependent upon the position of the moon. It was submitted that the fishermen may have to go for fishing even during the night time when there is high tide and one can imagine the situation when it is completely dark. This amounts to mischief because this act of the petitioner is very much likely to render navigable river less safe for fishing or travelling and further this illegal act is being done with intent to cause wrongful loss to the poor fishermen and wrongful gain for themselves. (petitioners).

13.5 The learned counsel submitted that there are certain fishermen who cannot even afford wooden poles and nets which are employed by the petitioner in this behalf. Therefore, the authority has tried to regulate the activity of those fishermen by prohibiting the activity of fishing by putting wooden poles.

13.6 Learned counsel for the respondent has relied on the judgement of the Hon'ble Supreme Court in the case of STATE OF KEARALA VS. JOSEPH ANTONY reported in AIR 1994 SC 721. In that case the dispute was essentially between the fishermen in the State of Kerala who use traditional fishing crafts such as catamarams, country crafts and canoes which use manually operated traditional nets and

those who use mechanised crafts which mechanically operate sophisticated nets like purse seine, ring seine, pelagic trawl and mid water trawl gears for fishing in the territorial water of the State. The Hon'ble Supreme Court was concerned with the provisions of Kerala Marine Fishing Regulation Act, 1980 to regulate fishing by fishing vessels in the sea along the coast line of the State. The Act also provides power to regulate, restrict or prohibit certain matters within the specified area. Section 4 of the Act gives power to the State Government to regulate, restrict or prohibit certain matters within the specified area. The said section provides power for issuance of the Notification and the State Government can issue Notification. The Government issued Notification by which (i) fishing by mechanical vessel was prohibited in territorial waters except for small specified zones. (ii) use of gears like purse seine, ring seine, pelagic trawl and mid water trawls was prohibited along the coast line and (iii) motorised country crafts were permitted fishing, by way of exemption, in parts of the prohibited area. This Notification was challenged before the High Court. The High Court delivered judgement where the said Notification was struck down. After considering the decision, the Government issued another Notification and stated that the State was convinced of the need to protect the interest of the persons engaged in fishing using traditional fishing crafts such as catamarams, country crafts and canoes in the territorial waters of the State and since further there was need to preserve law and order in territorial waters, the use of purse seine, ring seine, pelagic and mid water trawl gear for fishing in the territorial waters along the entire coast line of State shall stand prohibited. This Notification was challenged before the High Court and the High Court struck down the said Notification. Division Bench of the judgement of the High Court reported in 1986 Kerala 238. The High Court held that the Notification issued by the Government imposing ban on the use of purse seine net beyond the said 10 kms. as being unreasonable restriction on the fundamental right guaranteed under Article 19(1)(g) of the Constitution.

13.7 Being aggrieved and dissatisfied with the aforesaid judgement of the High Court, the matter further carried in appeal before the Hon'ble Supreme Court and the Hon'ble Supreme Court after considering various reports of the State Government has observed on page 732 at paragraph 14, 15 and 16 thus:-

"Para 14 - The aforesaid data on record clearly show that the ban on fishing by mechanised nets

like purse seines, ring seines, pelagic and mid water trawls is necessary firstly for protecting the source of livelihood of the already impoverished mass of fishermen in the State and also to save the pelagic fish wealth within the territorial waters from depletion and eventual total destruction.

In addition to the above two factors, we have on record the report of the IGP which shows that several violent incidents had occurred on account of clashes between the users of mechanised crafts and those of the traditional crafts within the State territorial waters. The State Government was, therefore, fully justified in acting on the said report and banning the fishing by the mechanised nets within the territorial waters on that ground as well.

Para 15 - The contention on behalf of the respondent-operators of mechanised gears firstly that the purse seines which they are operating at present are not fit for off-shore and deep sea fishing and hence they should be permitted to fish within the territorial waters, in the circumstances, has to be rejected. The operators of purse seines are few and rich with enough resources at their command. They do not ordinarily form part of the fisherman population proper. Fishing is not their traditional source of livelihood. They have entered the fishing `industry' only as late as in 1979 and as entrepreneurs to make profits. They obviously look upon fishing as a business and not as a means of livelihood. Assuming, therefore, that the boats which they are at present operating are not fit for off-shore and deep-sea fishing, they can always replace or convert them for such use. Even with the present boats they can easily diversify their fishing methods to bottom trawling, trolling line, gill netting, pot fishing etc. which are not prohibited in the territorial waters. They can also engage in hook and line fishing and dory fishing for fish resources like shark, cat fish, perches and anchoviella. With their financial resources they can also change over to sophisticated fishing crafts for off-shore fishing for exploiting fish resources beyond the territorial waters.

Para 16 - By monopolising the pelagic fish stock

> within and by indiscriminate fishing in the territorial waters they are today denying the vast masses of the poor fishermen their right to live in two different ways. The catch that should come to their share is cordoned off by the giant and closely meshed gears leaving negligible quantity for them. Secondly, the closely meshed nets kill indiscriminately the juvenile with the adult fish and their eggs as well. That is preventing breeding of the fish which is bound in course of time to lead to depletion and extinction of the fish stock. There is thus an imminent threat to the source of livelihood of the vast section of the society. The State is enjoined under Art. 46 of the Constitution in particular to protect the poor fisherman-population. As against this, the respondent-operators are not prohibited from fishing within the territorial waters. They are only prohibited from using certain types of nets, viz. purse seines, ring seines, pelagic and mid water trawls. There is, therefore, no restriction on their fundamental right under Art. 19(1)(g) to carry on their occupation, trade or business. They cannot insist on carrying on their occupation in a manner which is demonstrably harmful to others and in this case, threatens others with deprivation of their source of livelihood. Since, in the circumstances, the protection of the interests of the weaker sections of the society is warranted as enjoined upon by Art. 46 of the Constitution and the protection is also in the interest of the general public, the restriction imposed by the impugned notification on the use of the gears in question is a reasonable restriction within the meaning of Art. 19(6) of the Constitution."

13.8 The learned counsel for the supporting respondent has also relied on another judgement of the Hon'ble Supreme Court in the case of KERALA SWATHANTHRA MALAYA THOZHILALI FEDERATION AND OTHERS VS. KERALA TRAWLNET BOAT OPERATORS' ASSOCIATION AND OTHERS reported in 1994 AIR SCW 239. There also the Apex Court was considered the question of provisions of Section 4 of Kerala Marine Fishing Regulation Act. In that case the Government also issued Notification. By virtue of the said order, cancelled the Notification prohibiting fishing within the territory of waters for a period of 44 days in the year 1982. In para 25 on page 3259 the Court observed as under.

"The said restrictions serve twin purposes, viz. assuring the livelihood of the traditional fishermen whose number runs into several lakhs and also to ensure that indiscriminate fishing is not indulged in by these trawl-boats within territorial waters."

13.9 Further at para 28 the Hon'ble Supreme Court has observed as under:

"The Government is perfectly justified in saying that it is under an obligation to protect the economic interest of the traditional fishermen and to ensure that they are not deprived of their slender means of livelihood. Whether one calls it distributive justice or development with a human face, the ultimate truth is that object of all development is the human being. There can be no development for the sake of development. Priorities ought not to be inverted nor the true perspective lost in the quest for more production. It should also be noticed that bottom trawling is not being prohibited altogether. It is being prohibited only during the monsoon period i.e. about a period of forty four days in a year. If there are boats which are capable of bottom-trawling beyond territorial waters, they are free to go beyond territorial waters and fish there, but the writ petitioners' boats which are not capable of bottom trawling beyond territorial waters cannot be allowed to indulge in bottom trawling within territorial waters, under the excuse, or guise, of going beyond territorial waters or in the name of `innocent passage', relying upon the provisos to Section 5 of the Kerala Act. The State Government acting under Section 4 of the Kerala Act is not only competent to impose the aforesaid limited restriction/ban but also to prescribe measures to ensure due implementation of the said restriction and to ensure against its violation."

13.10 The learned counsel for the respondent has also relied on the provisions of Section 283 and 431 of the IPC that the petitioner cannot claim right to carry on fishing activity which is otherwise prohibited under the law. In any view of the matter when the law tries to regulate and prohibit such activity, it will not violate the provisions of Article 19(1)(g) of the Constitution.

13.11 The judgement of the Apex Court in the case of BABULAL PARATE VS. THE STATE OF MAHARASHTRA reported in AIR 1961 SC 684 is relied upon by the learned counsel for the respondent. The Hon'ble Supreme Court has held that orders under Section 144 to be reasonable restriction and section does not confer any arbitrary power Order under Section 144 of the Code is in interest of maintenance of public order. She has submitted that the disputed is raised by two groups. With a view to resolve this dispute, the Government has issued Notification.

13.12 The learned counsel further submitted that the Notification issued only in the month of monsoon season on the ground of apprehended danger which has been pointed out by various persons. They submitted that Notification also stated the purpose , grievance made in the representation and the Notification also considered various material facts namely representation of other people, report of the Director of Fisheries and report of the D.S.P. They submitted that the Magistrate has performed his duty under the Code. He has taken into consideration all evidences on record. He has also enquired about the matter and thereafter issued the Notification. He has also considered necessary evidence and therefore the Notification issued under Section 144 of the Code is legal and valid. In view of the two judgements of the Hon'ble Supreme Court, the authority is perfectly justified in putting restriction on the fishermen who are carrying on fishing activity with wooden poles and nets. To put a reasonable restriction they can carry on business in the traditional way with small boats and nets.

14.1 I have considered the rival submissions of the petitioner, the learned counsel for the respondent as well as the learned counsel for the supporting respondents as well as the provisions of the Code, provisions of the Constitution and also various authorities cited before me. It is no doubt true that at the interim stage for the material which was available I had taken the view that the petitioner has prima facie case. However, when the matter is argued at great length and when the Government has pointed out various aspects and some of the contentions which have been raised at the final hearing was not advanced at the interim stage which I have now considered. In my view in view of the the Constitutional position and in view of the judgement of the Hon'ble Supreme Court 1961 and 1994, the Notification

issued under Section 144 puts a reasonable restriction on the persons who are carrying out fishing activity it only prohibits activity of fishing with wooden poles with nets for two months. However, it also protects the interest of small fishermen who are carrying on fishing activity with traditional way. The authority has also taken into consideration the report of the Director of Fisheries, report of DSP and other persons and the Notification is trying to protect the public safety and prevent apprehended danger that occurs due to use of wooden poles and therefore in my view the Notification puts reasonable restrictions in this behalf. Therefore, the said Notification is legal and valid and the interim injunction granted by this court earlier by the order dated 30.7.2001 is vacated. In my view the authority has tried to regulate the fishing activity in the other area. By issuing Notification and directing a group of fishermen not to carry on fishing activity by putting up wooden poles and nets, the authority has considered public safety and the interest of other fishermen.

14.2 In my view the Notification issued only for two months in the monsoon season on the ground of apprehended danger which has been pointed out by various persons. In my view the Notification also states the purpose, grievance made and the representation made by various authorities. In my view the authorities have considered the material facts before issuing the same, namely, report of D.S.P., Director of Fisheries etc. In my view the learned Additional District Magistrate has also considered the provisions of the Code. He has also considered the other evidences on record. He has also enquired about the matter and thereafter issued the Notification. It is no doubt true that the Notification has tried to prohibit fishing by putting up wooden poles and thereby trying to protect the activity of small fishermen who are carrying on activity of fishing in traditional way. Thus, the Notification has tried to preserve and protect the interest of weaker sections of the people namely small fishermen who carry on the fishing activity in the traditional way. Thus, the object of Article 46 of the Constitution is achieved by issuing Notification and under Entry 21 the State legislature has ample power both to regulate and prohibit the activity of fisheries. In my view the Notification tried to regulate the activity of fishing and it puts a reasonable restriction on the activity of fishermen.

14.3 In view of the aforesaid observations, the petition is rejected. For the aforesaid reasons the

other petitions, namely, Spl. C.A. No. 5274/2001, 5275/2001 and 5276 /2001 are also rejected.

(K.M. MEHTA, J)
(pkn)

After pronouncement of the judgement, Mr. Dagli, learned advocate on behalf of Mr. Y.S. Lakhani, states that the petitioners desire to file appeal against the aforesaid order and therefore the stay order which was granted by this court vide order dated 30.7.2001 may be continued upto 17.8.2001. Mr. Variava, learned counsel for the respondent strongly objected to the same. Mr. Dagli submits that tomorrow i.e. 15.8.2001 being public holiday it will not be possible for him to file appeal and place it for hearing before 17.8.2001 and if the stay is not granted, there will be some complication in this behalf. So interim relief which has been granted earlier is extended upto 16.8.2001.

(K.M. MEHTA, J)
(pkn)